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# The New Lawyer



**Law and Society Series**

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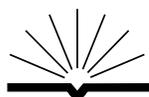
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*A list of the titles in this series appears at the end of this book.*

*Julie Macfarlane*

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The New Lawyer: How Settlement Is  
Transforming the Practice of Law



**UBC Press** • Vancouver • Toronto

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15 14 13 12 11 10 09 08 5 4 3 2 1

Printed in Canada on ancient-forest-free paper (100% post-consumer recycled) that is processed chlorine- and acid-free, with vegetable-based inks.

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### Library and Archives Canada Cataloguing in Publication

Macfarlane, Julie

The new lawyer : how settlement is transforming the practice of law /  
Julie Macfarlane.

(Law and society series, ISSN 1496-4953)

Includes bibliographical references and index.

ISBN 978-0-7748-1435-5

1. Practice of law – Canada. 2. Practice of law – United States. 3. Dispute resolution (Law) – Canada. 4. Dispute resolution (Law) – United States. I. Title. II. Series: Law and society series (Vancouver, B.C.)

K120.M33 2007 347.71'09 C2007-904426-3

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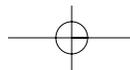
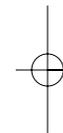
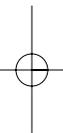
### Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada through the Book Publishing Industry Development Program (BPIDP), and of the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Aid to Scholarly Publications Programme, using funds provided by the Social Sciences and Humanities Research Council of Canada.

UBC Press  
The University of British Columbia  
2029 West Mall  
Vancouver, BC V6T 1Z2  
604-822-5959 / Fax: 604-822-6083  
[www.ubcpress.ca](http://www.ubcpress.ca)

*To Ellie,  
whose energy and passion inspires and extends me*



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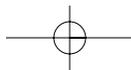
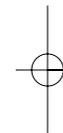
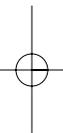
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## Preface

A 98 percent civil settlement rate and the increasing use of negotiation, mediation, and collaboration in resolving lawsuits have dramatically altered the role of the lawyer. The traditional conception of the lawyer as “rights warrior” no longer satisfies client expectations, which centre on value for money and practical problem solving rather than on expensive legal argument and arcane procedures. Based on my own empirical research, conducted over the past ten years with lawyers and their clients, this book explores changes that are taking place in legal practice as we enter the twenty-first century and prepare for the emergence of what I call “the new lawyer.”

The book begins by examining and assessing the changes that have occurred within both the legal profession and the justice system over the past thirty years. In the profession, the business model has altered dramatically. Legal practice is now dominated by large firms and corporate customers. The economics of legal practice have been transformed by widespread reliance on billable hours, which reinforces both internal hierarchies and the traditional, time-consuming tasks of legal practice – the accumulation of vast amounts of information and procedural machinations – while litigation moves along at a sluggish pace.

Another significant change during this same period is in the demographic composition of the profession. There is a new diversity among entrants to the profession that holds out the prospect of change. However, evidence so far suggests that the strength of the profession to assimilate newcomers into its traditional norms and values is stronger than the means and will of new entrants to map out new pathways. This may change as a critical mass of lawyers develops who are other than white and male.

There are also signs that the patience and deference of the consumers of legal services is beginning to fray around the edges. Both corporate and personal customers appear increasingly unwilling to passively foot the bill for a traditional, litigation-centred approach to legal services, preferring a more pragmatic, cost-conscious, and time-efficient approach to resolving

legal problems. A growing reluctance to spend very large amounts of time and money on litigation has provided an impetus for another highly significant change: justice reform. The most important of these reforms have introduced mandatory settlement processes into the civil courts, in the form of mediation and judicial settlement conferences. The same rationale – encouraging earlier settlement in as many cases as possible – has prompted the introduction of judge-directed case management in order to move cases along more efficiently. Similar changes are occurring in criminal law, with the introduction of diversion programming and restorative justice alternatives to incarceration, effectively institutionalizing plea bargaining and offering a range of new processes and sanctions. In family matters, the courts have often been more reluctant to press settlement procedures on parties because of obvious concerns (articulated by an effective lobby) about the potential for coercion and power abuse between spouses. Nonetheless, family courts across North America have been quietly developing diverse multi-service programs for the past twenty years, offering parties mediation, counselling, and sometimes a meeting with a family judge in an effort to resolve matters short of trial. As well, family law is an area in which voluntary participation in alternatives to litigation has grown exponentially, primarily in the form of family mediation or collaborative family lawyering. Finally, as the courts push mediation on recalcitrant parties and lawyers, many corporations and institutions have determined for themselves that they wish to adopt new voluntary policies and codes of practice that emphasize a problem-solving approach to conflict resolution, and aim to reduce their litigation budget.

For the last ten years, I have studied the ways in which lawyers are adjusting to changes in disputing processes. This book draws in particular on four major studies I completed during this time. Three of these four were concerned with the impact of the introduction of court-connected mediation on both lawyers and their clients. In 1995, I used surveys, interviews, and analysis of the court database to evaluate the Toronto ADR pilot (*Court-Based Mediation in Civil Cases: An Evaluation of the Toronto General Division ADR Centre*). In 2000-01, I conducted in-depth interviews with a sample of commercial litigators in both Toronto and Ottawa who regularly participated in the court-connected mediation programs in each city (*Culture Change*). In 2002-03, I evaluated the court-connected mediation program in the Saskatchewan Court of Queen's Bench (with Michaela Keet) and talked to lawyers and their clients in both focus groups and interviews as well as analyzing the court database (*Learning from Experience: An Evaluation of the Saskatchewan Queen's Bench Mandatory Mediation Program*). Finally, from 2001-04, I studied the phenomenon of collaborative family lawyering by following cases in four cities (Vancouver, Medicine Hat, Minneapolis, and

San Francisco) and interviewing lawyers and their clients (*Collaborative Lawyering Research Project*).

In addition, during this time, I evaluated the mediation programs offered by the Canadian Human Rights Tribunal (1999-2000) (*Systemic Change and Private Closure in Human Rights Mediation: An Evaluation of the Mediation Program at the Canadian Human Rights Tribunal*) and the Public Service Staff Relations Board (also 1999-2000) (*Negotiating Solutions to Workplace Conflict: An Evaluation of the Public Service Staff Relations Board Pilot Grievance Mediation Project*) (both projects undertaken with John Manwaring and Ellen Zweibel). Some of this data has also found its way into this book. Finally, during my year as Virtual Scholar-in-Residence at the Law Commission of Canada (2002-03), my work on the Commission's major policy paper on restorative justice (*Transforming Relationships Through Participatory Justice*, 2004) enabled me to talk with many lawyers and judges about their experiences of using restorative justice procedures and their impact on legal and judicial practice.

The hundreds of lawyers I have interviewed and observed throughout the course of these research projects have told me a great deal about the types of skills and knowledge they need in order to be effective in this new environment. Lawyers have many stories to tell about the adjustments in mindset and skills that are required by these new processes and the ways in which they have altered their relationship with their clients, whether commercial or personal. Further, their clients have given me insight into what clients – both corporate and personal – need and want from their lawyers, as well as into their own struggles with adjusting their image of a lawyer from that of a “warrior” to a “conflict resolver.” Many other researchers also have explored the significance and impact of these new processes, building a body of empirical work that points to important patterns and themes in the changing nature of legal practice.

These lessons are consolidated and presented in this book. I argue that changes in procedure, voluntary initiatives, and changing client expectations are coming together to create a new role for counsel and a new model of client service. This role is moving away from the provision of narrow technical advice and strategies that centre on litigation and fighting toward a more holistic, practical, and efficient approach to conflict resolution.

The result is a new model of lawyering practice that builds on the skills and knowledge of traditional legal practice but is different in critical ways. The new lawyer is not completely unrelated or dissimilar to the “old lawyer.” The new lawyer is an evolved, contemporary version of the old lawyer, and evolution and adjustment to change are the hallmarks of a vibrant profession. Both the old and the new lawyer offer legal expertise as their primary and unique skill. Both need client communication skills,

good writing skills, and, sometimes, persuasive oral advocacy skills. Both frequently find themselves negotiating settlements. However, the new lawyer has discovered that she needs to utilize these skills in different ways and in new and different processes. The goals of these processes are almost always information exchange and the exploration of options. Sometimes they include the settlement of some peripheral issues, sometimes full resolution. The old lawyer is more familiar with processes that rehearse and replay rights-based arguments, look for holes in the other side's case, and give up as little information as possible. The new lawyer bases her practice on the undisputed fact that almost every contentious matter she handles will settle without a full trial and perhaps without a judicial hearing of any kind. She assumes that negotiation often directly involving her clients is feasible in all but the most exceptional cases and that in this capacity she is an important role model and coach for her clients. The new lawyer understands that not every conflict is really about rights and entitlements and that these are conventional disguises for anger, hurt feelings, and struggles over scarce resources. The new lawyer recognizes that part of her role is to assist her clients in identifying what they really need, while constantly assessing the likely risks and rewards as well as what they believe they "deserve" in some abstract sense. She also understands the purpose and potential of information in settlement processes. In adversarial processes, information is used to gain an advantage over the other side (information as "power over"); in settlement meetings, information is used as a valuable shared resource to broaden the range of possible solutions (information as "power with"). The types of outcomes that will be contemplated, discussed, and even promoted will also be different, including rights-based assessments that may be interim, long-term or short-term, relationship-centred, heavily pragmatic, or simply expedient. The practical and conceptual differences between the work of the old lawyer and the practice of the new lawyer are profound, and this book will present these using research data and many stories from the field.

At the heart of this new model is a concept I call conflict resolution advocacy. The new lawyer's advocacy role is focused on developing the best possible outcome – often in the form of a settlement – for her client, using communication, persuasion, and relationship building in contrast to positional argument and "puffing" up the case. This understanding of advocacy builds on traditional "zealous advocacy" but goes beyond the narrow articulation of partisan interests to the practical realization of a conflict specialist role for counsel.

At the same time, the lawyer-client relationship is fundamentally altered by the trend away from professional deference and the growing demands by clients of all types for value for money in legal services. Changes in

the understanding of the lawyer-client “bargain” affect norms of decision making and control between lawyer and client, as clients participate more directly than before in settlement processes and determine how much time, money, and emotional energy to invest and in what type of resolution. In this book I explore the practical and conceptual dimensions of this new lawyer-client relationship, which I conceptualize as a working partnership. Some chapters tackle the question of the role of the law and legal advising in conflict resolution advocacy and the new ethical challenges faced by the new lawyer.

This book also argues that there are many aspects of legal practice – and its foundation in legal education – that have not yet caught up to the changing professional identity of the lawyer. Students are still graduating from law school imagining that their appellate moot court experience is representative of the work they will do in practice. Few schools offer negotiation and mediation advocacy courses. There is a misfit between the image projected by law school of legal practice and the reality. There is also a misfit between the core beliefs and values held by many lawyers, often unconsciously and uncritically, and the practical exigencies of the new disputing environment. These values and beliefs are first formed at law school and then challenged and refined in practice. They translate into what behaviours and practices are seen as professional, appropriate, and effective. I argue here that these beliefs and values need to be rethought in order to recognize changes in the disputing environment and in practice. Modifying these values and beliefs inevitably affects the behaviours and practices that are critical to the lawyer’s professional identity, which is the core of how things get done in legal practice.

Some lawyers are already actively engaged in reshaping their professional role and identity. Disillusionment with the traditional “warrior” mentality has motivated some lawyers to initiate new ways of practising law that reflect a desire – both philosophical and pragmatic – to bring peace and resolution, rather than fight protracted court battles. These lawyers will welcome this book, and it will reflect much of what they already know and practice, albeit intuitively. I also hope that this book will be of interest to law professors and teachers, law students, members of bodies that regulate the legal profession, mediators, justice officials, and all others who work with and alongside lawyers in conflict resolution.

Lawyers who are more skeptical about the process of change, and those who are resistant to it, will also read this book, I hope. They may be surprised to find that it does not propose a rejection of traditional lawyering but, instead, presents an analysis of how many of the tools and skills of the zealous advocate can be melded with the new skills, knowledge, and sensitivities of conflict resolution advocacy. This book does not call for “paradigm

change” but recognizes the reality of change and of a new approach to lawyering and client service that, while building on the old, is ready to meet the challenges of the new.

This book urges change, but it also offers an argument for the continued strength and vitality of the legal profession. Lawyers play a vital role in conflict resolution. They offer a unique form of client service. Lawyers are specialists in identifying legal issues and predicting legal outcomes. They should also offer their clients practical support, mentoring, counselling, risk assessment, and respect. The new lawyer will maintain and strengthen the place of the legal profession in our communities and allow lawyers and the public to again feel good about what they do.

## Acknowledgments

This book is the culmination of ten years of research, teaching, and thinking, and there are many people who have played an important role in its development. My greatest debt of gratitude is owed to my hundreds of research subjects – lawyers, clients, judges, and others – who were generous and patient as they were subjected to my interrogations. Many of them told me that they hoped that describing their knowledge and experience would be valuable for others, and I hope they see that this goal was somewhat achieved in this book.

Over this period, I have received generous research funding for my various projects from the Social Science and Humanities Council of Canada, the Law Commission of Canada, and the Department of Justice, Canada. This financial support has been critical, and, as a researcher, I also appreciate the moral encouragement that this type of recognition brings.

A supportive yet always challenging professional community developed around me as I worked on these projects. I want to thank especially my dear friends and colleagues John Manwaring and Chris Honeyman, who along with Bernard Mayer and Gemma Smyth read and commented on earlier drafts of this book, and the “data chicks” for many instructive and inspiring conversations. I received terrific support and assistance from a galaxy of student researchers during both the gestation and the writing of this book. For helping me to cross the final finish line, I extend my grateful thanks to Hena Singh and Raong Phalavong.

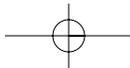
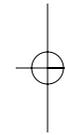
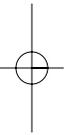
We lost our dear friend and colleague Rose Voyvodic just as I was completing this book. Rose taught me better than any other person or any learned text that in facing new challenges and complexities, the touchstone for the new lawyer must be client-responsive service: practical, humane, and dignifying. Rose will forever epitomize the very best of the new lawyer for me.

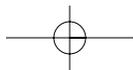
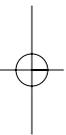
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Finally, I want to thank those who support and nurture me on a daily basis and make all things possible for me: at the barn, my wonderful coach and supporter Hilary, my faithful steed Houdini, and my new friend Louie; my constant doggie companion Lucy and her runaway sisters; my three beloved daughters, Sibyl, Ellie, and Hopey; and, with gratitude and love, my husband Bernie Mayer.

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# The New Lawyer





# 1

## Changes in the Legal Profession and the Emergence of the New Lawyer

You're giving a speech about lawyers and *conflict resolution*?  
Huh? I don't usually connect lawyers with conflict resolution.

– Waiter in Vancouver hotel

The disassociation between lawyers and conflict resolution expressed in this statement reflects the divide between the public image of what lawyers do and their perceived relevance to the practical solving of problems. This public image associates lawyers with conflict, not conflict resolution – whether as one's own advocate or as the agent of an adversary. This statement may also reflect the growing distance between private citizens and the delivery of legal services. Over the past thirty years, legal services have increasingly focused on corporate and institutional clients, diminishing their relevance for ordinary people with domestic disputes (and without the resources to pay for expert aggression or defence). The disassociation between lawyers and conflict resolution also does not work for commercial clients, who need to solve their business conflicts without unnecessary expense, delays, obfuscation, and posturing. The huge costs of protracted litigation and the delays in accessing judicial hearings increase a sense of profound disconnect between lawyers and attainable, expeditious conflict resolution.

If lawyers do not represent conflict resolution in our public culture, then what is their function? There is an urgent need for lawyers to modify and evolve their professional role consistent with changes in their professional environment. The most important of these changes are widespread public dissatisfaction with the delays and costs associated with traditional legal processes, and the disappearance of full trials in all but a fraction of cases – the so-called “vanishing trial.”<sup>1</sup> Articulating a widespread experience, one Ontario lawyer points out, “It's considered exceptional now if we actually litigate something to a trial.”<sup>2</sup> Despite the centrality of trial advocacy in the popular image of lawyering, it is now not uncommon for a partner in a law firm to have had little trial experience – and occasionally none.

While lawyers often assert that the declining trial rate demonstrates their ability to ultimately settle almost all their cases before trial, even beginning

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litigation may be an unattractive and unrealistic option for a client who wants an expeditious and practical solution at a reasonable cost. To be effective and successful in practice, the lawyers of the twenty-first century must find other ways to meet their clients' best aspirations – the achievement of effective, appropriate, and sustainable outcomes within a reasonable time frame rather than years tied up in legal procedures, draining their resources, and chasing an apparition of vindication and victory.

There is a growing realization among lawyers and their professional organizations that they are in danger of rendering themselves irrelevant to many ordinary people.<sup>3</sup> At the same time, they are concerned that the types of conflict resolution service that they have traditionally provided for commercial and institutional clients – specialized legal advice and file management through the shoals of litigation – often looks inappropriate and even irrelevant in the face of business realities. Spending vast sums of money and swatches of time on “fighting” is no longer acceptable to major corporations and institutions<sup>4</sup> and may never have been compatible with business culture.<sup>5</sup> The demand for value for money is coming through loud and clear from all client groups, probably accelerated by the phenomenal explosion of access to legal information facilitated by the World Wide Web.<sup>6</sup>

Governments and policy makers have already begun to act. Placing a high priority on cost-savings and efficiency, jurisdictions across North America have introduced earlier, informal, and simpler processes into civil and criminal justice systems, many focused on reaching an agreed bargain or resolution. Some of these new approaches have been forced on lawyers by policy makers who recognize the inefficiency of a conflict resolution model in which almost everything resolves before trial, but only after years of expending vast amounts of money on lawyers' fees and accumulating enormous amounts of paperwork, much of which is never used in the construction of a settlement.

The signs are clear and incontrovertible. Change is needed. And change is coming.

### **The Legal Profession and Change**

The last thirty years have been a period of significant upheaval and reorganization within the legal profession. This chapter will analyze the most important of these changes and their impact on the role of the profession and the delivery of legal services. It will also offer an evaluation of the impact of these changes and begin to examine the complex relationship between the conservatism of the legal profession and the challenge of change. The contemporary profession reflects a classic tension between stasis (the tendency to resist change and hold tight to the status quo) and change. So much has changed, yet so much has stayed the same.

John Heinz and Edward Laumann characterize the legal profession as an “overdetermined social system,”<sup>7</sup> arguing that it is uniquely shaped by the changing social institutions of the external world. The legal profession is highly sensitive to economic change and developments in technology. The lawyer’s role is continuously shaped and reshaped by the social and economic interests served by law. As agents for their clients’ interests, lawyers must be responsive to changes in economic structures, political climates, social expectations, and disputing cultures. The same information drives a lawyer’s self-interested response to changing market conditions. In other words, the profession is most responsive to those changing societal conditions that relate to its economic viability and wealth. Moreover, the historical development of the legal profession suggests that it is more concerned with following changes (particularly in the market) than with initiating change or with innovation. In this way, the profession is “more creature than creator of events and environment.”<sup>8</sup>

While they must adapt in order to survive, lawyers also play a critical role in legitimizing new ideas and practices and in mediating between these ideas and their clients. Richard Abel notes that once new knowledge and skills are recognized as being legitimate and important, the profession will buy into what they regard as a significant means of ensuring their continued professional status – dominance even – in the field of dispute resolution.<sup>9</sup> The legal profession seems chameleon-like in its ability to mould itself to whatever current needs will sustain or extend its economic and social reach.<sup>10</sup> In studying the legal profession, we are, in effect, studying the changes in social institutions, relationships, and expectations that are relevant to law. Adjustments and reorientations in legal practice – whether administrative, procedural, philosophical, or strategic – are at least in part a response to changes in the environment.<sup>11</sup> The last thirty years offer numerous examples of this adaptive ability.

### **Economic, Structural, and Demographic Changes within the Profession**

The structure of the profession – in particular, its economic focus and, hence, its practice emphasis – has altered dramatically over the final twenty-five years of the twentieth century. An obvious place to begin this analysis is the size of the bar. The number of lawyers has almost doubled in both Canada and the United States since the 1970s.<sup>12</sup> The size of the Canadian Bar has grown ten-fold since 1951, and it is estimated that the profession grows by 15,000 lawyers every five years.<sup>13</sup>

Major changes have taken place within the economic structure of the profession, with growing numbers of larger units or firms that reflect changes in client markets. The practice of law has become increasingly directed to the service of corporate and institutional clients, reflecting the

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expanding influence of increasingly large corporations, which are in turn impelled by the search for more efficient economic models in Western markets. The dispersion of lawyers among different sectors of the profession means that, while there are still sole practitioners entering the professional marketplace, the proportion of practice conducted in larger organizational groups has risen at a much sharper rate, often at the expense of sole practitioners who now face competition in their “core” areas – divorce, landlord and tenant issues, simple wills, and consumer bankruptcies – from a barely regulated market for para-legals and contract lawyers working for low salaries in larger firms.

While much of the data used as evidence of these changes originates in the United States, it is broadly applicable to other common law jurisdictions with similarly developed market models, legal professions, and legal systems. The profession in both Canada and the United Kingdom, for example, has experienced very similar patterns of economic restructuring over this period. Two studies that examined work patterns among lawyers in the Chicago Bar have been especially influential in highlighting these changes. The first Chicago study, published in 1975, suggested that two “hemispheres” of legal work were emerging, one related to delivering services to personal clients and the other dedicated to serving commercial clients.<sup>14</sup> A second study sponsored by the American Bar Foundation and published in 1995 found a similar separation between personal and commercial work although there was some overlap – for example, a tax lawyer might have both personal and corporate clients – and generally a much higher level of specialization among practitioners.<sup>15</sup> These conclusions were broadly accepted by Canadian researchers John Hagan and Fiona Kay, who recognized that the two hemispheres were typically represented by different models of a law firm, with larger firms representing commercial clients and smaller firms or sole practitioners representing personal clients.<sup>16</sup> Most significant, perhaps, is the fact that in the last quarter of the twentieth century the corporate sector grew at a far greater rate than the personal sector. In the second study, 61 percent of Chicago lawyers’ time was spent on work for corporate clients compared with 53 percent in the first Chicago study, while the figures for personal client work dropped from 40 percent to 29 percent by 1995.

To meet the expanding demand from commercial and institutional clients, increasingly large firms (the so-called “mega firm”) have begun to emerge. These firms can more effectively respond to corporate client needs by offering specialized departments and teams of lawyers dedicated to serving particular clients. The second Chicago study found that the average number of lawyers in a single law firm had rocketed from twenty-seven in 1975 to 141 in 1995. Ron Daniels and Hagan and Kay have found a similar trend toward larger firms and the absorption of sole practitioners in studying

firms in Ontario in the early 1990s.<sup>17</sup> Firms that serve mostly commercial clients can now offer them a range of highly specialized legal services in new or emergent areas that were unheard of thirty years ago, including international trade law, e-law, and a range of intellectual property disciplines. Professional regulators increasingly offer specialist qualifications and designations that recognize areas of special expertise. Law school curricula also offer a larger range of subjects, representing many new specializations, especially in business law.

Unsurprisingly, the earnings of solo practitioners have declined significantly over the last thirty years, and the earnings of lawyers (and especially partners) in large firms have risen exponentially. The profitability of larger firms is maintained by the concept of the “billable hour”; as a result, targets are set for lawyers at all levels and younger associates, in particular, are required to work extremely long hours. Competition for the best young lawyers also means that in some cases earnings are rising at a faster rate than profits,<sup>18</sup> which simply increases the pressure to bill more hours to make up the shortfall.<sup>19</sup> The supremacy of the billable hour has other consequences too. By separating fee generation from salary calculation, the firm establishes and maintains a hierarchy within that is tightly controlled by the partners. Some firms now encourage consolidating the power of the partners by establishing two levels of partnership – one that enjoys only limited rights – in order to delay the achievement of full partnership status for associates.<sup>20</sup> Mobility within the firm is difficult other than by embracing the given criteria (not only the volume of billable hours but also the various social requirements such as client contact and networking). In order to be economically successful within this model, lawyers must also accept significant limitations on their personal autonomy and decision making.<sup>21</sup>

The dominance of the mega-firm market model within the professional culture has had a profound impact on professional identity. Law students quickly learn to regard articles on Bay Street or a job on Wall Street as the ultimate mark of status and success at law school. However, once they begin working within a large firm, their self-image may be challenged by the realization that the economic conditions of their labour constrain the types of professional autonomy and responsibility for decision making that they assumed would come with the “dream job” for which they have competed so fiercely.

Another consequence of the growth of corporatism in the second half of the twentieth century has been the establishment of corporate legal departments and the emergence of a new professional role: in-house corporate counsel. Almost unheard of prior to the 1950s, the number of in-house positions has grown rapidly and demonstrates the significance attached by large corporations to keeping a firm handle on their legal

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strategies and costs. Where litigation is still contracted outside the corporation, in-house counsel acts as a highly informed client asserting the company's interests. Robert Nelson found that the proportion of lawyers in corporate positions had risen from 4.4 percent in 1948 to 9.8 percent in 1988.<sup>22</sup> According to a survey conducted by the Association of Corporate Counsel in 2004, there were 71,702 corporate counsel working in 23,540 corporations in the United States. This number represents approximately 10 percent of the total number of practising lawyers in the United States.<sup>23</sup> In Canada, the Canadian Corporate Counsel Association was established as a conference of the Canadian Bar Association in 1998 and now has almost 9,000 members.<sup>24</sup>

As well as undergoing structural and economic changes, the demographic composition of the profession has also changed dramatically during this period, at least at the entry level. Women and minorities are entering law school and the profession in unprecedented numbers, and law school classrooms and associate levels in law firms have taken on a different gender and ethnic composition as a result. For example, in the 1950s, just 4 percent of law school entrants were female. By the 1990s, the numbers of men and women in law school classrooms had become virtually equal.<sup>25</sup> Lesser, but still significant, increases have also been recorded in the numbers of minority students attending law school, rising from 4.3 percent of enrolment in law schools approved by the American Bar Association in 1969 to 13.1 percent in 1990.<sup>26</sup>

However, it seems that previously excluded groups such as women and minorities have not yet acquired sufficient power to affect the organizational culture of the law firm. Research shows that these newer members of the profession also leave at higher rates than established white males and that, even when they stay, they rarely acquire the trappings of power and status their white male counterparts continue to enjoy. Fiona Kay and John Hagan's work has highlighted the marginalization of women in practice, even when they reach partner level.<sup>27</sup> The systemic barriers, including the lack of role models and mentors and unsocial working hours, were chronicled in the 1995 report *Touchstones for Change: Equality Diversity and Accountability*, which concluded that the consequence is a "glass ceiling" in the legal profession for women and minorities.<sup>28</sup> Women are also leaving the profession in greater numbers than men.<sup>29</sup>

This means that despite some efforts at diversification, especially at the level of law school recruitment, the legal profession in Canada continues to be overwhelmingly white and under-representative of minority groups. A 2004 survey sponsored by the Law Society of Upper Canada reported that less than 1 percent of the sample described themselves in one of the following categories: African-Canadian, South Asian-Canadian, or Aboriginal.<sup>30</sup> It is well known that minority law graduates face greater obstacles

securing articles than Caucasians. Lawyers of colour face many barriers similar to those of women lawyers, including a lack of mentoring opportunities and difficulty achieving partnership status. Like their female colleagues, minority lawyers are often marginalized in particular roles within the profession, with an assumption that they will prefer and adopt certain positions.<sup>31</sup> The consequence is that minority lawyers are well represented in legal clinics and government positions, and under-represented in the larger law firms that represent the economic engine of the profession.<sup>32</sup>

The combined structural changes of the last thirty years have profoundly reshaped the business model of the profession. A market model of lawyering composed of large and very large firms, providing increasingly specialized services to primarily corporate and institutional clients, has become dominant. These changes have transformed the organizational and economic structure of the profession, although it is far from clear whether the profession's core values and practice norms have altered as a result. The limited impact, to date, of a new generation of women and minority lawyers should alert us to an apparent contrast between the relative ease with which the profession accommodates changes to its structure and organization, while resisting deeper changes to professional norms and values.

### **Changes in Dispute Resolution Processes**

There is pressure all around for civil justice reform – from government, from policy makers, from the largely dissatisfied and often disenfranchised public, and from influential members of the bench and bar. The widespread introduction of court-connected and private mediation programs, case management, and judicial mediation is testament to concerns about costs and delays in justice. The rate of resolution before trial has risen to 98.2 percent.<sup>33</sup> All courts function differently than they did twenty years ago, with at least some shift toward the judicial management of cases and their settlement.

Some of the most significant innovations in developing an early and informal dispute resolution process have grown out of the dissatisfaction felt by some members of the profession with the limits of traditional litigation to bring peace and closure to their clients. Some sectors of the bar have started to experiment with practice models that focus on practical problem solving and have reduced their reliance on complex, expensive, and time-consuming procedures. A few initiatives – for example, collaborative law, where counsel is retained only to negotiate and is disqualified from litigating this case, in an effort to incentivize negotiation – have developed out of the frustration of lawyers who want to offer their clients a faster, less expensive, and more pragmatic, humane, and realistic approach to conflict resolution.

Far more frequently, however, the requirement of early settlement meetings

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is imposed by courts and legislators in response to the frustration of personal and commercial clients who, not unreasonably, want justice delivered in a timely and accessible forum. In Ontario, a 1994 civil justice review found that it cost each party an estimated \$38,000 to take a case to a three-day trial. The average family income in the same year was \$44,000.<sup>34</sup> Commercial clients have begun to turn in growing numbers to in-house counsel who are given strict budget parameters for litigation – and some corporations have started to cultivate a pragmatic, settlement-friendly approach to litigation.

The realization among policy makers of an acute need for change in public justice systems has been a watershed in many North American jurisdictions and has led to the initiation of dozens of programs that encourage and facilitate early negotiation and assessment of resolution possibilities. Civil justice innovations throughout North America, especially over the past twenty years, have focused on changing the procedural context within which settlement might occur, including case management programs (setting timelines, encouraging the early exchange of documents) and court-annexed mediation programs (assigning a neutral third party to facilitate settlement discussions and/or to evaluate potential legal outcomes).

Even before the initiation of major procedural reforms designed to divert civil cases into early settlement negotiations, the number of full trials had been steadily declining for at least three decades. Data collected by Marc Galanter show that, in spite of the growth of all aspects of the legal system (more law, more lawyers, more judges, more court personnel, and increased budgets), the absolute number of trials has declined significantly since 1962.<sup>35</sup> The phenomenon of the “vanishing trial” is probably not limited to the United States. The proportion of civil cases that proceed to full trial in Ontario has also been falling over the past twenty years. One study using a sample of approximately 600 cases a year shows that recourse to full or partial trials fell from 4.9 percent in 1973-74 to 3.2 percent in 1993-94.<sup>36</sup> Ironically, the decline in the number of full trials appears to have had little overall impact on the accumulation of cases on trial lists since, where trials do take place, they are often longer and more complex (using more expert witnesses and taking up more courtroom time).

The shift away from full trials – and the growing importance and credibility of processes designed to facilitate the settlement of issues that are unlikely ever to be argued in a courtroom – has many layers of significance for the legal profession. Recent scholarship examining the phenomenon of the “vanishing trial” has pulled back the curtain on the diminishing amount of time litigators now spend on trial work and asks what this means for how lawyers are trained and how they set realistic professional goals.<sup>37</sup> Lawyers (and judges) are increasingly involved in legal tasks that are not related to trials. This does not necessarily mean that the practice of law

is focused exclusively on settlement activities, although such activities are increasingly important. In understanding the trend of declining trials, it is important to note the increase in pre-trial and motions activity, which is described by Gillian Hatfield and others in the United States.<sup>38</sup> Similarly, in Ontario, courtroom time attributed to motions and to pre-trials rose by 69 percent and 140 percent respectively between 1989-90 and 1993-94.<sup>39</sup>

Lawyers are playing a different role, offering different kinds of service to their clients and performing different tasks. Some of these tasks, such as negotiating with the other side or providing the written forms of advocacy required for pleadings and other litigation documents, are familiar but acquire a new significance in a legal culture that is increasingly conscious of the need to offer practical problem solving and resolution. Lawyers are also spending more time on newer and less familiar forms of advocacy such as judge-led settlement conferences and pre-trials as well as representation in mediation.

The combination of the decline of the full trial with the development of new processes (many of them mandatory) to facilitate dialogue about settlement has changed the environment within which civil litigation occurs. While the impact of these changes is greatest on civil litigators, it also reflects a new attitude toward the use of public adjudication – one that no longer assumes that this is the default dispute resolution. Also affected are lawyers who specialize in administrative law matters; most administrative tribunals now require or recommend an early settlement meeting, pre-trial, or mediation. Corporate lawyers are affected by a growing insistence among their clients on expeditious conflict resolution and a new focus on dispute resolution clauses and other planning devices to anticipate, and reduce the costs of, future conflict.

Reform is also taking place within the criminal justice system. Interaction between the public and the criminal justice system demonstrates similar patterns of dissatisfaction, diminishing trust, and a disconnect between the work of lawyers and the courts and the real-life solution of problems. Disillusionment with the effectiveness of the retributive model has led to legislative and programmatic initiatives to encourage restorative justice processes and outcomes that rest on the offender's acceptance of responsibility and agreement to cooperate with a sanctions regime. There is manifest evidence for the failure of the retributive model to reduce crime or increase public safety in light of recidivism rates.<sup>40</sup> Overcrowding in prisons and inadequate resources for rehabilitation programs mean that incarceration simply compounds tendencies toward crime and anti-social behaviours. The criminal justice system has also lost credibility as a fair and unbiased instrument of social control. In Canada, First Nations people make up 2 percent of the population of Canada but 10.6 percent of the

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prison population.<sup>41</sup> In the United States, blacks make up 12 percent of the population and 44 percent of the prison population.<sup>42</sup>

These startling social facts, along with the rise of victims' movements asking for greater involvement in the punishment process, have created a momentum to look beyond traditional models of crime and punishment to community panels, victim-offender mediation, and sentencing circles. In Canada, legislation now places a responsibility on criminal court judges to consider the possibilities of a restorative justice process for "all offenders, with particular attention to the circumstances of aboriginal offenders."<sup>43</sup> The 2002 *Youth and Criminal Justice Act* introduces a new regime described as "extra-judicial measures," which promotes the use of earlier and preventive alternatives to incarceration for juvenile offenders, where the offender pleads guilty and the victim is willing to participate in a dialogue.<sup>44</sup> Both of these innovations reflect the same trends seen in the civil courts, with an effort to reduce judicial time spent on hearing arguments and a corresponding emphasis on enlarging the responsibility of the parties, with the assistance of counsel, to negotiate an appropriate outcome. All of these processes are based on principles of dialogue, information exchange, and agreed outcomes, as are civil justice processes such as mediation and settlement conferencing. The universality of these norms is a reminder of just how closely related some types of criminal behaviour are to civil torts, especially where personal relationships are affected.<sup>45</sup> Just as civil litigators are having their legal practice changed by civil mediation and other settlement processes, so too are criminal lawyers seeing shifts in their work – their responsibilities, their relationship with client offenders or victims, and the strategies they may pursue – with the introduction of restorative justice measures.

How much impact have these procedural changes in dispute resolution processes had on the legal profession? Just as we saw in examining economic restructuring within the profession, there is plentiful evidence of significant external changes – in this case, in the ways in which contentious matters are managed by lawyers and by the courts. The sheer volume and extent of civil justice reforms suggest that a settlement orientation is here to stay. As well, some positive evaluation data<sup>46</sup> indicate deeper systemic changes measured by the acceptance of these new processes by both lawyers and their clients. While there is less clarity (and data) about the effectiveness of restorative justice programming (for example, in producing lower levels of recidivism), early experiments have produced good results.<sup>47</sup> Some (civil and criminal) programs have now been in existence for more than a decade, and we are beginning to see the mid-term impacts of an emphasis on facilitating early settlement wherever possible. A deeper level of acceptance and change may be a matter of time.

One conclusion drawn from studies of more established programs is that

continued exposure to mediation and other settlement processes, even where these are strongly resisted at first (especially where they are mandatory), generally builds recognition of the usefulness of the process and commitment to its continued use. Several studies now demonstrate that the attitudes of counsel become more positive with time and as a result of repeated experiences with mediation, and they have even described themselves as “converts” or “believers.”<sup>48</sup> As one lawyer put it:

My experience has now belied my original idea that counsel can always do this themselves ... I recognize that in some cases what happens would never have happened that way without a mediator ... Without a mediator we often stop [negotiating] on hearing first offers.<sup>49</sup>

Another lawyer summed up what these studies are showing when he stated:

I think it's fair to say that my experience with mediation has improved every time, and I suspect it will continue to improve.<sup>50</sup>

Similar changes over time are illustrated in data on changes in lawyer-client relationships in settlement processes. What is initially an unfamiliar and often uncomfortable shift in practice – working with the client present rather than holding him or her at arm's length from mediation – becomes more comfortable over time, and, as a result, lawyers can recognize and explore its potential benefits. Many find that their commercial clients welcome the opportunity to be more hands-on and active in the management of the file. Others point out that mediation can provide a welcome reality check for less experienced clients: “Mediation can ... put things into a different perspective, including seeing the shades of gray that were always apparent to the solicitors.”<sup>51</sup>

While these findings suggest change not only in the structure of dispute resolution but also in its spirit and values, other data paint a far less rosy picture. Attitudes toward restorative justice and, hence, the actual use made of alternative measures in sentencing juveniles and other offenders varies widely between prosecutors and courts. Civil justice reform that does not capture the hearts and minds of the local bar is often reassimilated into more familiar process models and outcomes. Lawyers are critical in influencing the attitude their clients will take toward mediation or any other mandated settlement process and in determining the amount of effort and goodwill that is invested in the process.<sup>52</sup> Settlement efforts require good faith, given lawyers' influence over their clients, and it is easy to turn the claim that these processes are a waste of time into a self-fulfilling prophecy. Other strategies for resistance include belittling mediators and other “softies” (colleagues) who are supportive of mediation,

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using mediation and settlement conferencing to obtain a strategic advantage (such as informal discovery) rather than with an intention to settle, and “going through the motions” by showing up but being totally unprepared to negotiate. In Toronto, lawyers talk about the “twenty minute mediation,” where they attend mandatory mediation without any preparation or intention of serious negotiation. The creative capacity of lawyers to find ways to frustrate the purpose of mandatory settlement procedures where they are convinced that mediation is unhelpful or useless is apparently boundless. Also in Toronto, lawyers boasted openly about defeating the random assignment case management system that existed in the mid-1990s by closing a file that was selected for case management and refileing it in the hope of escaping assignment. It is important to remember that formal procedural reforms are typically driven by legislators and policy makers and only rarely by lawyers themselves.<sup>53</sup> Unsurprisingly, imposed change, such as the introduction of case management or mandatory mediation, has not been welcomed by many bars, which regard such initiatives as an incursion on their professional autonomy.

Other lawyers accept the formal imposition of a mediation consideration but do not see this as having an impact on their practice.<sup>54</sup> There is a sense among some lawyers that these initiatives are a fad that will disappear, and they do not need to be concerned about any new knowledge or skills training that might equip them to function more effectively in some of these unfamiliar processes. Instead, lawyers can simply walk through new settlement-oriented processes in a mechanistic way, without making any commitment to the change or adjusting their norms and values or identifying or acquiring any new skills and knowledge. Other lawyers express open discomfort with processes that require a different approach to advocacy and negotiation, divergent from the traditional advocacy skills with which they are comfortable, and which are central to their self-image. As one lawyer put it:

I mean, we're trained as pit bulls, I'm not kidding you, I mean we're trained pit bulls and pit bulls just don't naturally sit down and have a chat with a fellow pit bull, the instinct is to fight and you just get it from the first phone call. I'm bigger and tougher and strong and better than you are.<sup>55</sup>

### **Change – What Change?**

This review invites the conclusion that the legal profession embraces some types of change and resists others. While historically adept in adapting to changing marketplace conditions, the core norms and values of the profession are much more resistant to change. Earlier in this chapter I suggested that the continuing difficulty faced by women and minorities in reaching

the same levels of status and influence as their white male peers is a good example of the ability of the profession to make structural adjustments without challenging or changing internal norms and values. The profession cannot resist the integration of women and minorities, but it can maintain its traditional systems of status, hierarchy, and evaluation in order to keep them "in their place."

A second example of the limits of structural change in changing deeper professional values is the entrenchment of traditional attitudes toward practice – for example, the image of the "pit bull" described in the earlier quote (or, as one female lawyer put it, "a bulldog with lipstick").<sup>56</sup> The types of strategies and attitudes implicated by the pit bull and bulldog analogies are still widely regarded as appropriate and even normative lawyering behaviour. This is despite the fact that justice reforms mean that lawyers are increasingly challenged to explore an early negotiated settlement via the intervention of a mediator or a judicial officer. It is certainly true that problem-solving styles of negotiation are more widely understood and utilized now than they were thirty years ago, the result of a growing market for continuing legal education programs and publications that teach models of problem solving and principled negotiation. However, there is also evidence that the traditional values of advocacy and adversarialism have, if anything, become more entrenched as a result of the increasingly competitive environment of the 1980s and 1990s. Extreme versions of these traditional values are common in larger firms in big cities, which promote competition and believe that they need to cultivate a macho image, particularly for their commercial clients.<sup>57</sup> The consequence is a noted decline in civility and the rise in adversarialism in civil litigation, exemplified by the increasing use of the unfortunately named "discovery" process to delay, obfuscate, obstruct, and badger.<sup>58</sup>

Possibly the most conclusive evidence for the assertion that despite sweeping structural changes, the profession's underlying norms and values remain relatively unchanged is to be found in our law school classrooms. While there have been important curriculum innovations – primarily the addition of specialized substantive courses, mostly in the business area but also in human rights, international law, and critical legal theory – the philosophy and substance of legal education, and, in particular, its implicit ideal of what makes a "good" or a "successful" lawyer, has been easily sustained without major challenge for the twenty-five years that I have taught in law schools. There have been some calls for a renewed commitment to professionalism<sup>59</sup> and some work on enhancing the practical nature of aspects of the law school curriculum.<sup>60</sup> However, legal education continues to be focused on the teaching of substantive knowledge, an adversarial normative framework, and the dominance of adjudicative decision making. Considerations that are not relevant to the making and proving of a legal

case are ignored, and students are not taught how to assess or deal with such issues – the “client” is a purely metaphysical concept to most law students. The lawyer’s “philosophical map” continues to include certain skills, knowledge, and values and to exclude others, and what is included and excluded remains largely static.<sup>61</sup> To be reminded of the entrenchment of these principles, one need only refer to documents like the Arthur’s Report,<sup>62</sup> which, while written in 1983, describes a reality that is little changed more than twenty years later, or to Brett Cotter’s review of the historical and contemporary inadequacy of ethics teaching in law schools.<sup>63</sup> The practice values promoted by legal education in North America continue to emphasize technical skills, client control models, and the irrelevance of non-legal and emotional considerations in disputing. These remain the dominant values of the profession.

It appears, therefore, that while significant changes have taken place in the structural, economic, and procedural character of legal practice, these have had far less impact than one might expect on the core practice norms and values or on the ways in which students are primed to enter practice. On the one hand, one can see the impact of an increasing focus on corporate clients and the power of the “mega-firms” in the business orientation of many law school curricula, yet this shift in emphasis does not extend to a re-examination of the lawyer’s role, and even further entrenches a traditional model of client advocacy founded on argument and assertion. There is a growing mismatch between traditional adversarial advocacy and the pressure to participate in early settlement processes – a tension experienced by many litigators and met with anything from outright resistance to demands for an entirely different approach to legal training. There is as yet no serious mainstream debate over what this means for the professional identity of the lawyer and the skills and services that she sells to clients. There is also little, if any, impact on the types of practice knowledge valued by larger and larger firms who serve an increasingly corporate-dominated client base; technical specialist knowledge is still widely regarded as many times more important than process experience or resolution expertise. At least at the point of hiring, there is little interest in other skills and qualities such as empathy, wise counsel, creativity, and conflict resolution. In this largely unaltered world, legal education continues to be functionally efficient – the image of lawyering promoted by the law schools fits with the qualities emphasized by many law firms at the entry level.

This apparent lack of interest in revisiting the profession’s core beliefs and values in light of change is not, of course, universal. At senior levels of the bench and bar, there are individuals who increasingly recognize the need for adjustment and the acquisition of new skills for negotiation,

consensus building, and settlement. In completing my research over the past ten years, I have heard and recorded these views, which usually emanate from the most senior and respected sources. However, these voices have not yet been able to challenge the traditional paradigm that law schools and the recruiters continue to use for what makes a “good” lawyer, namely, high grades awarded for memorization in technical courses and success in competitive mootings, rather than strong inter-personal and communication skills or successful clinical experience. At the critical point of entry to the profession, there is a continued failure to recognize the skills and qualities that are needed by a new generation of lawyers, in a new environment of dispute resolution, and facing a new generation of client expectations. The disconnect that occurs once these students become lawyers operating in the real world is plain to see.

The absence of real change in underlying values and norms should not really surprise us. Lawyers are an extraordinarily powerful professional group, whose clients hire them for their superior expertise and rarely question their judgment. Jokes denigrating the profession at large abound on the Internet, but how many clients – even sophisticated ones – can constructively and knowledgeably critique their lawyer’s strategy and demand a specific alternative course? Like any professional field of practice sustained by its high social status, much of what lawyers do as a matter of course – that is, diagnosis, strategy, argument, and, eventually in most cases, settlement – has gone unquestioned and unchallenged for decades, despite the possibility of alternative approaches, potential efficiencies, and new ideas. Although there is evidence of increasingly negative public attitudes toward the legal profession as a whole, most clients report that they are satisfied with their own lawyers.<sup>64</sup> There is no apparent threat to the assumptive status of lawyers as the authoritative agents of conflict resolution in our communities.<sup>65</sup> Evidently, the public has enduring faith in the legal system and regard lawyers as the appropriate, if disliked, agents within this system.<sup>66</sup> Clients and potential consumers of legal services generally do not have an alternative model of lawyering that they will require or demand when they retain a lawyer. They just know that they want a speedy and inexpensive solution to their dispute. Unfortunately, the tools and skills of the old lawyer are often ill-suited to achieve these goals, but many clients – especially the “one-shotter”<sup>67</sup> – can only accept their lawyer’s assurances that this is the “best course” of action and do not have the experience or knowledge to critique their lawyer’s performance. Those who do are voting with their feet – for example, when corporate or institutional clients turn to their own in-house counsel to get the job done, or when middle-income clients decide to represent themselves in litigation.

**Changing Professional Identity: The Evolution of the New Lawyer**

What would it take for an evolved professional identity to emerge from the changes we are seeing in the structure of the legal profession and the practice of litigation? What would happen if, in addition to reorganizing the way it does business and manages client files, the profession also examined its professional identity – including its core values and skills – in light of the changes of the last thirty years?

**Challenging Assumptive Practice Habits and Beliefs**

The first step in any change process is a willingness to take a long hard look at cherished habits and modes of operation that may have become fossilized. There are many elements of the practice habits of lawyers – like any other professional – that are routine and go largely unquestioned. Every lawyer could identify some routinized habits in his or her particular practice. Some of these habits relate to negotiation, which is used as a detailed case study in Chapter 3.<sup>68</sup> There are also parallel sets of habits and routines for litigation drafting, courtroom advocacy, corporate deal making, and so on. Some of these habits are useful, important, and often successful. Others need reevaluating in light of contemporary conditions. All need to be related to the needs of the individual client.

Practice habits arise from, and are sustained by, norms and values that form the ideological backbone of the lawyer's professional identity. These norms and values are sustained by beliefs, many adopted unconsciously and long ago. The evolution and modification of beliefs is an incremental process, which should continue over the course of an individual's professional life and over the centuries-long development of the legal profession. In order to challenge beliefs, it is necessary first to recognize and understand them, which may also mean challenging them. It is the hallmark of a vibrant and responsible profession that it can reevaluate itself and its roles without fear and in anticipation of offering enhanced service.

Re-examining old habits does not mean starting again from scratch – far from it. While the skillful and effective representation of clients in settlement-oriented processes requires new “habits” of action and thought, these can be built on the traditional advocacy skills of lawyers. The discourse over just what needs to change – especially where this is led by lawyers who have personally embraced alternative approaches to practice – has sometimes been misleading and polarizing. Some loudly proclaim that the only acceptable change is one that amounts to the complete redrawing of the lawyer's professional role. An expression frequently heard in training sessions for new collaborative lawyers or aspiring lawyer mediators is “paradigm change.” A call to lawyers to embrace “paradigm change” assumes that real change requires the elimination of the old “paradigm”

(characterized by the old lawyer) and its replacement with a “new” paradigm (the new lawyer).<sup>69</sup>

This is an unhelpful and inaccurate characterization of what is happening and what is necessary for lawyers to challenge and to change their entrenched practice habits and beliefs. For example, the core value that lawyers should protect and advance their clients’ interests is not changed by new dispute resolution processes that focus the parties on the potential for settlement. Many of the traditional tools that lawyers use to protect client interests remain important, for example, the evaluation of possible outcomes, the development of strategy, and the firm assertion of bottom lines (often supported by legal advice). The introduction of consensus-building processes into legal disputing structures does not mean an elimination of the “old” system of litigation. Rather, litigation continues to run alongside efforts to settle legal disputes using settlement processes. Although trial work makes up a much smaller part of legal practice than it has done in the past, many trial advocacy skills are similar to, or congruent with, the skills and techniques that the new lawyer needs to practice conflict resolution advocacy. For example, good litigators are extremely capable of assimilating large amounts of new information, analyzing and synthesizing data, and moving between strategies and options in order to maximize their clients’ gains (often by providing expert legal advice). The new lawyer needs these same skills, albeit exactly how that information is used, and what types of strategy are most critical in building consensus, are quite different than presenting a winning argument to a judge.

Many lawyers feel justifiably offended by the implication that in order to move forward into a changed disputing environment they need to wipe out everything they ever learned and begin afresh with a transformed paradigm of practice. This assumption is overly simplistic and fails to capture the way in which change is actually occurring in this new environment. Instead of paradigm change and transformation, what is really happening is the evolution of a new form of lawyering, which is more effective and more realistic within a changed disputing landscape in which trials are a rarity and settlement procedures are taking on both a new formalism and a new vitality.

The profession needs to be willing to challenge the assumptive habits of practice and belief and consider whether they are a fit with the new contours of the disputing landscape. This includes a willingness to take some risks and to cautiously experiment with new dispute resolution processes. Experience in new processes and approaches will, in turn, lead to a demand for training in evolved or modified lawyering skills that meets the challenges of this new environment by addressing the “skills gap.”

### The “Skills Gap”

Some lawyers are coming to recognize that there is a range of effectiveness in relation to their participation in settlement processes. As their experience grows, they recognize that some of their peers are especially effective in these fora but that others are often ill prepared and, as a result, sometimes wrong footed. Consequently, lawyers are beginning to identify special new skills and knowledge – albeit often built on more familiar practices – as valuable and relevant to them and their clients. Many of these skills and tools have developed on a “need-to-know” basis. Having been “thrown into” mediation or similar processes, and discovering that these processes often offer a genuine opportunity for advancing client interests, these lawyers have found that they need to develop different types of approaches in order to do an effective job for their client. For example, one lawyer explained:

My role has significantly changed and now I don't think a litigator can be a litigator without also being a ... person who has advocacy skills relevant to conducting the process of mediation ... How do you do an opening statement? How do you identify issues? How do you know to prepare yourself for what issues you want to give up? What issues do you want to hold on to? How do you best present your client's case? *All of those things are done quite differently at the mediation.*<sup>70</sup>

Despite there being an increased number of alternative dispute resolution training courses for lawyers, judges, and third parties, these courses – offered both in law schools and commercially in continuing legal education programs – tend to be general in nature and often include only a secondary focus on the role of the lawyer as a representative in mediation and other settlement processes. There have been a few books published over the last ten years on “mediation advocacy,” but the dearth of writing and training in this area speaks for itself.<sup>71</sup> There are complex and sophisticated skills involved in acting as a lawyer advocate in a settlement-oriented process, and our current state of knowledge about these skills and how to enhance them is as yet quite underdeveloped. This may explain why even lawyers who are positive about mediation often fail to recognize that they may require any new strategies, tools, or skills. A surprising number appear to believe that assuming the persona of “Miss Helpful,” who takes on a friendly and helpful facade in mediation, will be sufficient.<sup>72</sup> However, as settlement processes become more mainstream and accepted, the expectation of skillful performance, and its market value, rises. Firms and individual lawyers begin to market themselves as mediation or alternative dispute resolution “specialists” as this expertise becomes a valuable commodity.<sup>73</sup> Once the skills associated with effective settlement advocacy

become recognized as a commodity that has economic and reputational consequences, the profession will buy into what they regard as a significant means of ensuring their continued professional status.<sup>74</sup>

### **Changing the Norms of Legitimacy**

The ultimate step in any change process is altering the norms of legitimacy. In this case, it means determining what good lawyers do. Are they classic zealous advocates, who leave negotiation until the last minute, advocate positionally as long as possible, and assert rights-based arguments until a final “compromise” is reached on the courthouse steps? Are they the “good lawyers” of law school mythology, who spend every day in appeals court arguing obscure points of law? Or are good lawyers those who see themselves as conflict resolvers, providing efficient, realistic, principled, and humane dispute resolution with constructive and practicable results? A personal reputation for collaboration becomes a valuable resource where a critical mass within the community has embraced consensus building as being reflective of “good” lawyering. The following statement makes this point perfectly:

Good lawyers, in this town, understand what mediation’s about ... I think that’s what is accepted in the system, so lawyers have made the change.<sup>75</sup>

The challenge is to create credibility and legitimacy for new conflict processes within the profession itself. The norms that will be changed as a result encompass both community and personal values. Lawyers who choose to practise in a settlement advocacy model need a supportive community within which to work. One indicator of “real” change would be the point at which lawyers in a community find themselves regularly facing opponents who have a similar level of skill and commitment to engaging in serious settlement processes. Many lawyers describe the frustration they experience when a negotiation or mediation meeting reverts to the lowest common denominator – when the lawyer on the other side is poorly prepared, or unskilled, and/or unwilling to take the negotiation process seriously, they cannot gain traction. Exasperation with the predominance of settlement-averse lawyers in their community has led collaborative family lawyers to form their own networks that over time have provided critical mass for their alternative process.

Outside the voluntary networks of like-minded lawyers, a “critical mass” of support for settlement processes can only be achieved by changing the norms of legitimacy and the types of practice that are associated with “good lawyering.” This shift may be accomplished faster in smaller communities where the legal culture is more cohesive with stronger prevailing norms and a relatively homogeneous client base.<sup>76</sup> In larger communities,

the role of the most influential players in the wider legal community – and their leadership role in encouraging innovation and change – is critical. Local professional leaders include not only members of the judiciary<sup>77</sup> but also seasoned litigators. The experience of Ottawa and Toronto with mandatory mediation provide for an interesting comparison. In Toronto, there are some professional leaders committed to mediation, but these individuals are fewer and less powerful than their compatriots in Ottawa. This contrast is reflected in the peer group norms in Toronto. It is still not fashionable for top-flight Toronto litigators to be vocally supportive of mediation and certainly not of the mandatory mediation program. In contrast, the widespread acceptance of mandatory mediation in Ottawa is such that lawyers wish to be seen as supportive of such a positively regarded development. This is a strong indicator of change at a deep level – at the level of the norms of legitimacy.

### **The Myth of “Paradigm Change” and the Reality of “Convergence”**

I have argued above that calls for “paradigm change,” which would transform the role of lawyers and, in particular, diminish the significance of their specialist expertise and partisan advocacy, fail to understand the evolutionary process occurring within the profession. This is not to say that the evolution of the new lawyer does not bring substantial challenges to old ways of thinking and behaving, including challenges to the three key beliefs I articulate and set out in Chapter 2. Chapters 3, 4, and 5 highlight many new or modified attitudes and practices, which are in relation to the conduct of legal negotiations, client advocacy, and working with the client.

However, insisting on “paradigm change,” which in Thomas Kuhn’s original thesis means the elimination of the old and its replacement with something entirely new, is throwing out the baby with the bathwater.<sup>78</sup> Lawyers will continue to use and build on their foundational skills of negotiation, information assimilation and analysis, advocacy, and advice giving. Rather than eliminating the old paradigm and substituting a new one, the better analogy for the evolution of the new lawyer is a *convergence* between litigation and consensus building, representing both the old and new approaches to dispute resolution. What is meant by convergence is mutual influence and cross-fertilization, whereby the old informs the new and the new builds on the old. The new lawyer is evolving from the traditional paradigm rather than offering a new, transformative substitute paradigm.

The changes that we are seeing in legal practice represent the convergence of two quite different cultures of conflict resolution: adjudication and consensus building. Many of the growing pains of the changing disputing culture – the taking of positions or sides by lawyers who identify

exclusively or strongly with one of these two cultures, the stop and start of civil justice reforms – reflect the sometimes uncomfortable readjustment that is necessary to effect convergence between two such different cultures. At the extremes of each culture – those few lawyers who regard adversarialism as a credo and those equally few who would eschew law and legal advice as “contaminating” their settlement-only practice<sup>79</sup> – there will be no such adjustment but, rather, a hardening of commitment and eventual isolation from the mainstream of legal practice.

However, these are the exceptions. Most lawyers will experience some type of convergence. What happens in the process of convergence is that each culture takes on some of the ideas, values, and practices of the other, and there is an intertwining of cultural norms and traditions. Even the traditional zealous advocate, who finds herself in disagreement with many of the arguments in this book, will find her practice and, over time, her thinking to be affected by changes in procedure to encourage settlement, changing client expectations, and the increasing redundancy of protracted litigation to solve practical problems. At the same time, the committed proponent of collaboration and consensus building carries with her at least some of the assumptions and beliefs of the traditional practitioner. The convergence of different cultures, despite falling short of the creation of a “new” something, might be compared to a genetic combination, where the essential properties of each process or culture are significantly changed as a result. Of course, the convergence that I am describing does not take place in a single moment, and the mutual influence of the two cultures will develop and evolve over time. The process of convergence is also affected by ongoing environmental factors, such as the market for legal services, the efficiency of the courts, and continuing civil justice reforms.<sup>80</sup>

There is plenty of room for skepticism about both the authenticity and the desirability of “convergence.” Is convergence really a cover for the assimilation of one culture or model within the dominant one, a way of satisfying calls for change while maintaining the dominance of the old system? There are certainly precedents for this – for example, the ways in which Western legal adjudicative culture has swallowed up others (for example, Aboriginal conflict resolution traditions) by imposing its own criteria of substance and process.<sup>81</sup> Similar concerns are sometimes expressed that mediation and settlement processes may be co-opted back into an adjudicative mode by the widespread use of evaluative mediators, whose often-pressured approach focuses on the legal merits of the dispute. In processes that continue to be dominated by lawyers and legal discourse, clients will attend (satisfying the call for greater client participation) but often remain silent. Another potentially assimilative use of mediation is the instrumental use of mandatory mediation as an early, cheap discovery process. Nancy Welsh has used research data to persuasively argue that

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there is significant evidence of the assimilation of mediation into a model of adversarial litigation practice.<sup>82</sup> On the other side, those who strongly oppose any “dilution” of the traditional adjudicative model see mediated outcomes as “a watered down legal system.”<sup>83</sup> They express alarm that mediation, which is seen as the “soft” approach to conflict resolution, could take over and all but wipe out adjudication.<sup>84</sup>

It is premature to judge the likelihood or extent of assimilation between the two cultures of conflict resolution – adjudication and consensus building. However, convergence seems the most probable outcome in the absence of one or another model being roundly rejected, culturally and institutionally. Most lawyers who have become familiar with mediation and other settlement procedures already recognize the phenomenon of convergence at some level, even if they are not yet clear what particular new skills and knowledge these changes imply. Convergence also offers the best choices to the consumers of legal services. Consciously or not, lawyers are developing some skill in determining when each approach – adjudication or consensus building – would be appropriate. As lawyers blend the concepts of fighting and settling, what is increasingly common is a perspective on mediation and other fora that explores settlement as a process that not only recognizes serious differences between the parties, framed by the threat of legal norms and sanctions, but is also conscientious in its effort to find common ground:

Some mediators ... say: “Can’t we settle this, isn’t there a way that we can all just kiss and make up and go home?” ... that type of mediation ... is the antithesis of the old “take no prisoners” style of litigation. I like to think that myself and most mainstream litigators are *somewhere in between now*.<sup>85</sup>

### **The New Lawyer**

My contention that what we are witnessing is “convergence” between two cultures of disputing practice does not mean that the legal profession can or should be passive in the face of these changes. Lawyers and their professional organizations should take a proactive approach to managing the new disputing environment and continuously assessing the need for new skills and knowledge. The profession needs to apply the same agility and responsiveness that characterizes its approach to changing market conditions to changing procedures and processes and to client expectations for faster, less costly, and more effective conflict resolution strategies.

Within a convergent or blended model of legal services, law and legal advice continue to play a critical role – and not only in adjudication. There are many new alternatives for directions in legal practice, options that lie within the choice of individual practitioners and depend on how

they wish to practise law. If they are not to be left behind in the change process, the legal profession as a whole needs to take seriously the changing expectations of service, especially demands for value for money, the open provision of information, and timelines that keep pace with real-life needs and deadlines, which are replacing traditional assumptions of deference to a professional advisor.

If lawyers are to rise to the challenge of moving with the times, they must be willing to open up and reappraise some of the “sacred texts” of lawyering, including the devotion to zealous advocacy, the drift toward adversarialism, and the primacy of rights-based dispute resolution processes. It is not enough to change the structure of conflict resolution processes nor to reorganize the business of lawyering to protect profits and growth. There is a need for a “new lawyer” with evolved beliefs and new habits of practice.

This book will focus on three core dimensions of new lawyering that distinguish the new lawyer from the old lawyer. The first is the elevation of negotiation skills. Lawyers have always negotiated on behalf of their clients, but they have done so in a model that favours arm’s-length communication between agents and a bargaining dynamic framed by legal positions. Despite the regularity with which negotiation closes a dispute, negotiation has not been regarded as a primary area of expertise for lawyers. Negotiation skills are critical to the effectiveness of the new lawyer, and she will place a far greater emphasis than her predecessors on becoming an effective negotiator. The old tools of positional bargaining, which are often a ritual bluff and bluster represented by a terse exchange of offers, do not serve her or her client well in consensus building. They are being replaced by greater reliance on problem-solving strategies and more effort to directly include the client in face-to-face negotiation.

Second, communication skills, such as listening, explaining, questioning, and establishing rapport and trust, have always been important for lawyers who work directly with clients or as oral advocates. Yet in the litigation model, effective communication is an adjunct to the content of substantive and procedural arguments. In the hierarchy of effective communication skills, the pinnacle has traditionally been courtroom eloquence – the persuasive making of substantive legal arguments. For the new lawyer, a different type of eloquence is necessary. Communication becomes the primary vehicle for the resolution of conflict and not only the making of arguments, whether via negotiation, mediation, or another settlement process. The importance of interpersonal communication skills, and the potential for these to set one lawyer apart as being particularly skillful and ultimately successful, rises as a consequence. So does the significance of so-called emotional, as well as legal, intelligence, including attributes such as empathy, self-awareness, optimism, and impulse control, which

are important qualities for an effective negotiator.<sup>86</sup> Recognizing the importance of persuasive communication in conflict resolution also means a greater concentration on what the other side in a dispute needs and wants. Reaching a good agreement is not achievable using the old tools of assertion and reassertion. Other types of information and tactic are required. One experienced litigator describes this as follows:

I call it the new lawyering role. You do have to be in tune to the other side's interests. For instance, I've seen counsel do it for a plaintiff in a personal injury action, a lot of it is they just want to be able to look at my insurance client and vent, and money is not always what they want they just want the other side to feel their pain and to understand what they've gone through. You start thinking about what their interests are, and what they really need out of this mediation and a lot of times it's just that, in order for them to understand or for them or your client just to see the other side and hear their side of story and see what's driving them and their personality. You have to be more attuned to the interests of the parties and what's going on between them, I think.<sup>87</sup>

Third, the new lawyer's relationship with her client is different from the traditional paradigm. She considers her client a partner in problem solving, at least to the extent that it is feasible and desirable (for the client) in any one case. Ideally, there is a new mutuality of both purpose and action between lawyer and client. The client will participate more actively in planning and decision making and perhaps in the conduct of negotiations with the other side. The new lawyer offers a participatory model of compassionate, client-centred, professional service instead of the traditional "trust me" detachment of the old lawyer. Conflict resolution advocacy accepts the potential for human connection in lawyer-client relationships and needs counsel to be self-aware and transparent about their personal values and biases, lest these unknowingly interfere with their judgment.

The legal profession needs to pay urgent attention to an evolving model of legal practice and client service that will enable lawyers to practise as conflict resolvers in the twenty-first century. This is the challenge. Can the profession make itself invaluable to its existing clients and relevant to a more complete constituency? Can lawyers really be conflict resolvers despite the skepticism of the waiter whose quote opened this chapter? The next chapter opens this discussion with an examination of the status quo – the traditional core beliefs and values that presently impede or constrain the emergence of the new lawyer.